

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
FOURTH JUDICIAL DISTRICT AT BETHEL

STATE OF ALASKA,

Plaintiff,

v.

ALEXIE NICK WALTERS, JR.,

Defendant.

Case No. 4SM-17-00081CR  
FAIRBANKS JUDGE ASSIGNED

**MOTION TO DISQUALIFY JUDGE MACDONALD FOR ACTUAL AND  
APPARENT BIAS**

**VRA CERTIFICATION**

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any crime unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

Alexie Walters, through counsel, moves Judge MacDonald to recuse himself from Mr. Walters' case because Judge MacDonald has shown both actual and apparent bias against Mr. Walters and against the Public Defender Agency who is appointed to represent him such that his due process rights under the Alaska Constitution Art. 1, § 7 and the U.S. Constitution, Amend. V would be violated unless if Judge MacDonald is recused from Mr. Walters' case.

## I. FACTS AND RELEVANT PROCEDURAL HISTORY<sup>1</sup>

On October 6, 2017, Alexie Walters was charged with Murder in the First Degree, Murder in the Second Degree, two counts of Assault in the Third Degree, and Tampering with Evidence in the above captioned case. The Public Defender Agency was appointed to represent Mr. Walters on that same date, and Assistant Public Defender Amanda Harber entered her appearance on October 12, 2017.<sup>2</sup> The prosecutor initially assigned to this case was Assistant District Attorney Stephen Wallace. After a series of peremptory challenges and administrative reassignments, this case was assigned to Judge MacDonald on March 6, 2019 for all purposes including trial.<sup>3</sup>

### A. Relevant Procedural History Relating to Requests for Continuances and Changes in Attorneys Assigned to this Case

On March 15, 2019, the first omnibus hearing before Judge MacDonald took place. At that hearing, Mr. Wallace noted that he had extended an offer to Mr. Walters the day before<sup>4</sup> and thus he expected the case would be “pushed out a couple of months.”<sup>5</sup> After noting the “number of homicide cases [he has],” Mr.

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<sup>1</sup> To file this motion as expeditiously as possible, and to understand procedurally how this case got to its current posture, Mr. Walters’ counsel sought and received a copy of the court’s file and is relying on information contained in the log notes from said file. Mr. Walters’ counsel acknowledges the disclaimer given on each log note that it is not a verbatim transcript, but will rely on them for purposes of this motion in the absence of additional transcripts or audios.

<sup>2</sup> See Entry of Appearance for Amanda Harber dated October 12, 2017.

<sup>3</sup> See Judicial Assignment Order dated March 6, 2019 in the above captioned case.

<sup>4</sup> Notably, in her review of the Agency’s file for Mr. Walters, Ms. Metzger found a letter from Ms. Harber to Mr. Wallace dated December 17, 2018 attempting to begin negotiations in this case. To Ms. Metzger’s knowledge, Mr. Wallace did not respond until March 14, 2019.

<sup>5</sup> See Ex. A, Court log notes dated March 15, 2019.

Wallace requested a continued omnibus date followed by a statement that he “assume[d] this will not happen before the end of summer.”<sup>6</sup> Ms. Harber, who appeared for Mr. Walters, did not object to the state’s request, and the court scheduled a continued omnibus hearing for May 14 and trial the week of July 22.<sup>7</sup>

At the May 14 omnibus hearing, another attorney from the Public Defender Agency covered the case for Ms. Harber and requested a continuance citing ongoing negotiations.<sup>8</sup> At that time Mr. Wallace noted that the case would have to be reassigned within his office and that negotiations would have to start anew with new counsel for the state.<sup>9</sup> Mr. Wallace did not object to Mr. Walters’ request for a continuance and noted that he did not know what the availability of new counsel or witnesses would be for the July trial date.<sup>10</sup> The court continued the omnibus hearing to June 25 and the previously scheduled trial week of July 22 remained as set.<sup>11</sup>

At the June 25 omnibus hearing, the currently assigned prosecutor, Christopher Knowles, appeared for the state for the first time.<sup>12</sup> Because Mr. Walters was not brought to the Bethel Courthouse to attend his hearing, an attorney covering

<sup>6</sup> *Id.* It is not clear whether Mr. Wallace was referring to a continued omnibus date or trial with his remark that “this” will not happen before the end of summer.

<sup>7</sup> *Id.*

<sup>8</sup> See Ex. B, court log notes dated May 14, 2019.

<sup>9</sup> Ex. A. Mr. Walters’ counsel assumes this is because Mr. Wallace was appointed as a judge in Kodiak in March 2019.

<sup>10</sup> See Ex. B, court log notes dated May 14, 2019.

<sup>11</sup> Ex. B.

<sup>12</sup> Ex. B.

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2 for Ms. Harber noted the hearing could not go forward, and the court rescheduled  
3 the hearing to June 26.<sup>13</sup>

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5 At the omnibus hearing on June 26, Ms. Harber appeared for Mr. Walters, and  
6 Mr. Knowles appeared for the state. Ms. Harber requested a continuance citing a  
7 desire to continue negotiations, noting that if the case could not be resolved, she  
8 would need to file a motion to dismiss.<sup>14</sup> She also noted that she was “working a  
9 double case load” and provided information about scheduling difficulties she had  
10 surrounding the July 22 trial date.<sup>15</sup> Mr. Knowles requested the case remain set for  
11 trial asserting that there are were out of state witnesses who were prepared for  
12 travel<sup>16</sup> and stated that the state’s offer expired in April 2019 and that he had received  
13 no communication from Ms. Harber regarding an offer; thus, the “the only step is a  
14 trial.”<sup>17</sup> The court denied Ms. Harber’s request for a continuance and scheduled a  
15 calendar call for July 16 and trial remained as scheduled to bring July 22.  
16

17  
18 On July 15, 2019, Ms. Harber filed a motion to continue trial citing her  
19 resignation from the Public Defender Agency on that same day.<sup>18</sup>  
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22 <sup>13</sup> See Ex. C, court log notes dated June 25, 2019. Counsel for Mr. Walters spoke with  
23 David Case, the covering attorney on that date, to learn about the reason for rescheduling of  
the June 25 hearing and offers the explanation she was provided above.

24 <sup>14</sup> See Ex. D, court log notes dated June 26, 2019.

25 <sup>15</sup> Ex. D.

26 <sup>16</sup> Relevant, but not known, is whether this was communicated to Ms. Harber in advance  
of the hearing.

27 <sup>17</sup> Ex. D. Notably, Mr. Walter’s counsel has been unable to determine if Ms. Harber was  
28 apprised of Mr. Knowles’ assignment to this case such that she knew who to reach out to for  
continued negotiations. To date, Mr. Knowles has not filed an entry of appearance.

<sup>18</sup> See Def. Mot. to Continue dated July 15, 2019.

## B. The July 16, 2019 Calendaring Call Hearing

On July 16, Mr. Walters' current counsel, Assistant Public Defender Julia Metzger, appeared on his behalf at the calendar call hearing where Mr. Walters was also present. Mr. Walters' counsel made an oral motion to continue trial noting she learned of her assignment to this case the day before.<sup>19</sup> Former Assistant District Attorney Adrienne Bachman appeared on behalf of the state with Christopher Knowles and Monroe Tyler, and argued against a continuance suggesting instead that the court order Ms. Harber to conduct the trial despite the fact she no longer was an employee with the Public Defender Agency.<sup>20</sup> Ms. Bachman asserted that her office had discussed this case with Acting Public Defender Beth Goldstein and that Ms. Goldstein had agreed to contract with Ms. Harber to conduct Mr. Walters' trial.<sup>21</sup> The court then called Ms. Goldstein and Ms. Harber; Ms. Goldstein was available, but Ms. Harber was not.<sup>22</sup>

Ms. Goldstein offered that while she was willing to contract with Ms. Harber to conduct Mr. Walters' trial, she had not yet spoken with Ms. Harber about this proposal.<sup>23</sup> The court responded that it was considering a hearing to show cause why both the Public Defender Agency and Ms. Harber should not be held in contempt

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<sup>19</sup> See Ex. E, court log notes dated July 16, 2019, p. 1.

<sup>20</sup> Ex. E, 1.

<sup>21</sup> Ex. E, 1.

<sup>22</sup> Ex. E, 2.

<sup>23</sup> Ex. E, 2.

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2 due to the “abandonment of this case,” and to discuss the remedy for the contempt  
3 including costs against the Agency.<sup>24</sup>

4  
5 The court scheduled a hearing for July 18 noting that trial must occur the week  
6 of July 22 or sanctions would be ordered.<sup>25</sup> Ms. Goldstein advised that the Agency  
7 cannot keep an employee from separating from state service, and the court  
8 responded that the Agency and Ms. Harber “can explain themselves” at the next  
9 hearing.<sup>26</sup> The court went further to say that the Public Defender is responsible for  
10 the “neglect” of its clients, that the issue in this case was one of “complete  
11 abandonment and total disregard of professional responsibilities” noting a “pattern  
12 of conduct” and “professional abandonment” with respect to homicide cases but did  
13 not cite any additional information about the cases to which the court was referring.<sup>27</sup>

14  
15 The court subsequently issued an Order to Show Cause addressed to both  
16 Ms. Goldstein and Ms. Harber following the hearing on July 16 ordering them to  
17 appear at hearing on July 18.<sup>28</sup> Specifically, the court ordered Ms. Goldstein and Ms.  
18 Harber to show cause why they “should not be held in contempt of th[e] court for  
19 failure to fulfill their duties of professional responsibility in this case.”<sup>29</sup>  
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24 <sup>24</sup> Ex. E, 2.

25 <sup>25</sup> Ex. E, 2.

26 <sup>26</sup> Ex. E, 2.

27 <sup>27</sup> Ex. E, 2.

28 <sup>28</sup> See Ex. F, Order to Show Cause dated July 16, 2019.

<sup>29</sup> Ex. F.

### C. The July 18, 2019 Show Cause Hearing

On July 18, the court held a show cause hearing. Ms. Goldstein, Deputy Director Doug Moody, Ms. Metzger, and Mr. Walters were present, Ms. Harber was present with counsel, and Ms. Bachman, Mr. Knowles, and Mr. Tyler were present for the state.<sup>30</sup> The court began by stating its inclination to appoint Ms. Harber to the case so that trial could remain as scheduled.<sup>31</sup> When asked about her position on this proposition, Ms. Harber's attorney noted some practical problems with the proposal, such as Ms. Harber's lack of malpractice insurance at that time and asked the court to hear from Ms. Goldstein.<sup>32</sup>

Ms. Goldstein then detailed for the court the staffing problems currently facing the Alaska Public Defender Agency, including several openings in both the Bethel and Kenai offices she is unable to fill, and specifically noted the departure of three of the most experienced attorneys from the Agency's Kenai office where Ms. Harber worked.<sup>33</sup> Ms. Goldstein went on to relay that after the July 16 hearing, she learned more about the circumstances of Ms. Harber's departure, namely that she "hit the wall" and was experiencing "mental exhaustion" as a result of the "immense"

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<sup>30</sup> See Ex. G, Transcript of Proceedings from the July 18, 2019 show cause hearing, p. 3-4. Mr. Walters' counsel notes that the entire transcript has been provided here so that there is full context for Judge MacDonald's remarks. Mr. Walters' counsel has mailed an audio version of the hearing to both the court and the state and labeled it as Ex. H so that anyone reviewing this motion can listen to these remarks as they were delivered—Judge MacDonald's tone, demeanor, and interaction with Agency lawyers in particular are telling and provide additional important information to understand the basis for this motion.

<sup>31</sup> Ex. G, 4:15-16.

<sup>32</sup> Ex. G, 4:22 – 5:5.

<sup>33</sup> Ex. G, 5:13 – 6:17.

caseload to which she was assigned while also serving as a secondary supervisor of the Kenai office.<sup>34</sup> In response to a question concerning Ms. Harber's fitness by this court, Ms. Goldstein acknowledged that she did not believe Ms. Harber was fit to try Mr. Walters' case at this time.<sup>35</sup>

The court then inquired as to whether Ms. Goldstein would report Ms. Harber to bar counsel as "not fit to be practicing law at this time."<sup>36</sup> Ms. Goldstein responded that she would not, observing that Ms. Harber followed the Bar Association's instruction for lawyers experiencing mental exhaustion<sup>37</sup>—that is that they should step away from their cases presumably before they harm their clients by way of ineffective assistance of counsel, or perhaps even themselves.

The court next heard from Ms. Bachman who acknowledged and echoed the problems Ms. Goldstein described noting staffing issues the District Attorney's office was experiencing.<sup>38</sup> Ms. Bachman reiterated the inconvenience to the state previously described at the July 16 hearing, namely that Mr. Knowles and Mr. Tyler spent time preparing for trial including travel to Mountain Village and also discussed vacation adjustments they each had to make.<sup>39</sup> Ms. Bachman then described a "lack

<sup>34</sup> Ex. G, 5:16, 6:18-23.

<sup>35</sup> Ex. G, 8:14-16.

<sup>36</sup> Ex. G, 8:17-19.

<sup>37</sup> Ex. G, 8:20 – 9:1.

<sup>38</sup> Ex. G, 9:8-10, 17-22.

<sup>39</sup> Ex. G, 10:3-13.



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2 of courtesy” her office experienced because they were not told when Ms. Harber  
3 sent in her notice of resignation.<sup>40</sup>

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5 In response, the court asked Ms. Bachman if she could provide a “cost bill” for  
6 the costs incurred in the previous two weeks that otherwise might have been avoided  
7 had the state known about Ms. Harber’s plans to leave the Agency.<sup>41</sup> Ms. Bachman  
8 said she could if ordered but expressed reluctance to do so citing the health of the  
9 relationship between the two offices.<sup>42</sup>

10  
11 The court then asked Ms. Harber’s lawyer for her position followed by this  
12 question, presumably directed to Ms. Harber’s attorney: “Is Ms. Harber not fit to  
13 practice law next week?”<sup>43</sup> Ms. Harber’s lawyer responded that he believed she was  
14 fit to practice law but reiterated the practical problems with ordering Ms. Harber to  
15 try Mr. Walters’ case.<sup>44</sup>

16  
17 After the discussion detailed above, the court began a seventeen minute  
18 diatribe over the course of which it made multiple statements necessitating this  
19 motion. These comments will be listed here and further addressed below.

- 20 - The court admonished the Public Defender Agency for “failing to recognize  
21 [its] professional obligations and the classical notion that there is always  
22 choice within necessity.”<sup>45</sup>

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25 <sup>40</sup> Ex. G, 10:14 – 11:2.

26 <sup>41</sup> Ex. G, 11:11-13.

27 <sup>42</sup> Ex. G, 11:14-21.

28 <sup>43</sup> Ex. G, 13:20-21.

<sup>44</sup> Ex. G, 13:22 – 14:3.

<sup>45</sup> Ex. G, 14:9-10.

- The court asserted that the Agency's lawyers are "often tied up in district court tending to B misdemeanors, demanding trial in the Bethel region...tying up precious resources over lesser cases" noting that while "those cases [may] have merits, [] there is choice within necessity."<sup>46</sup>
- The court observed the several societal interests implicated in this case and observed that they "require the marshalling of professional courage and the management of professional resources at a priority over other matters."<sup>47</sup> The court found that the state "recognized this" and that the state lawyers met their professional obligations but that the Agency, and Ms. Harber, had not.<sup>48</sup>
- The court displayed its inability to afford Mr. Walters the presumption of innocence when it stated "if the people of Alaska are expected to tolerate the crime that brings us here today: the crime against women, the crimes fueled by substance abuse, the crimes against law enforcement officers, the crimes against rural Alaska, *the crimes continually perpetuated by defendants with repeated felonies, as Mr. Walters has*, they should be so advised."<sup>49</sup>

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<sup>46</sup> Ex. G, 14:14-20.

<sup>47</sup> Ex. G, 14:21 – 15:10.

<sup>48</sup> Ex. G, 14:21 – 15:10.

<sup>49</sup> Ex. G, 17:1-6 (*emphasis added*).

- The court claimed that the Agency has “completely abandon[ed its] obligations [to protect Alaskan’s fundamental rights].”<sup>50</sup>
- The court posited that the Agency must hire “more conscientious attorneys.”<sup>51</sup>
- The court stated that a public defender’s concern about ineffective assistance is “the last refuge of public defenders who don’t want to try their cases and fulfill their professional responsibilities.”<sup>52</sup>
- The court predicted that “some time in 2020, Ms. Metzger, on the current pattern, is 50/50 going to be standing here with her hat in hand passing this onto someone else or perhaps, even like Ms. Harber, just disappear.”<sup>53</sup>
- The court inappropriately instructed that this case is to “move to the top of [Ms. Metzger’s] responsibilities.”<sup>54</sup>
- The court asserted it “would find that if Ms. Metzger is scurrying around in district court or handling C felony theft cases, confronted with the professional imposition that has been imposed on it, that would be a further demonstration of the of the Public Defender’s office misfeasance,”<sup>55</sup> and instructs that this case is “to be given this highest priority.”<sup>56</sup>

<sup>50</sup> Ex. G, 17:7-13.

<sup>51</sup> Ex. G, 18:18-19.

<sup>52</sup> Ex. G, 19:22-24.

<sup>53</sup> Ex. G, 18:14-17.

<sup>54</sup> Ex. G, 22:21-22.

<sup>55</sup> Ex. G, 22:25 – 23:4.

<sup>56</sup> Ex. G, 23:10-11.

- 1
- 2 - The court refused to allow Ms. Goldstein to correct what she believed were
- 3 “misunderstandings [the court had] about the [agency’s] management,”
- 4 instructing her instead to file them in writing.<sup>57</sup>
- 5

6 **II. STANDARD FOR RECUSAL**

7 The Alaska Code of Judicial Conduct requires that “[i]n the performance of

8 judicial duties, a judge shall act without bias or prejudice and shall not manifest [such

9 bias or prejudice] by words or conduct.”<sup>58</sup> The Code further requires disqualification

10 of the judge “in a proceeding in which the judge's impartiality might reasonably be

11 questioned [because] the judge has a personal bias or prejudice concerning a party

12 or a party's lawyer.”<sup>59</sup>

13

14 Under AS 22.20.020(9), “a judicial officer may not act in a matter in which the

15 judicial officer feels that, for any reason, a fair and impartial decision cannot be

16 given.” The Alaska Supreme Court has relied on the judicial canon to interpret AS

17 22.20.020(9) to require a judge to consider not only a showing of *actual* bias, but

18 also the *appearance of impartiality*.<sup>60</sup> The Alaska Court of Appeals has held that

19 “Alaska law mandates disqualification of a judge when the circumstances give rise

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22 <sup>57</sup> Ex. G, 23:17-24:12.

23 <sup>58</sup> Alaska Code of Judicial Conduct Canon 3(B)(5). See generally Marla N. Greenstein,

24 *Judicial Disqualification in Alaska Courts*, 17 Alaska L.Rev. 53, 71 (2000) (“Although the Alaska

25 Code of Judicial Conduct is only directly enforceable through judicial disciplinary proceedings

26 conducted by the Alaska Commission on Judicial Conduct, it provides guidance to judges in

interpreting their ethical obligation to disqualify and has been used by the courts to enhance

interpretation of the disqualification statute's full meaning and intent.”)

27 <sup>59</sup> Alaska Code of Judicial Conduct Canon 3(E)(1)(a).

28 <sup>60</sup> *Wasserman v. Bartholomew*, 923 P.2d 806, 815 (Alaska 1996)(citing *Perotti v. State*,  
806 P.2d 325, 327 (Alaska Ct. App. 1991); *Amidon v. State*, 604 P.2d 575, 577-578 (Alaska  
1979)).

1  
2 to a reasonable appearance of bias, even if there is no proof that the judge is actually  
3 biased.”<sup>61</sup> Similarly, a judge “should disqualify himself or herself in a proceeding in  
4 which the judicial officer’s impartiality might reasonably be questioned.”<sup>62</sup>  
5

### 6 III. PROCESS FOR DECIDING RECUSAL

7 With this motion, this court must consider whether it harbors actual bias  
8 against the Public Defender Agency and/or Mr. Walters, whether its actions have  
9 given rise to the appearance of bias or impartiality against the Public Defender  
10 Agency and/or Mr. Walters during the July 16 and July 18 hearings, or both.  
11 Because Judge MacDonald is the presiding judge of the Fourth Judicial District,  
12 should Judge MacDonald agree with Mr. Walters and consent to his disqualification,  
13 this case must be reassigned by the Chief Justice of the Supreme Court.<sup>63</sup> If,  
14 however, Judge MacDonald does not agree with Mr. Walters and denies his  
15 disqualification, Judge MacDonald’s decision will be reviewed by another judge  
16 assigned for this purpose by Presiding Judge Allard of the Court of Appeals.<sup>64</sup>  
17  
18

### 19 IV. ARGUMENT

20 In this case, Judge MacDonald has shown actual bias against the Public  
21 Defender Agency and against Mr. Walters specifically and by extension. At a  
22 minimum, Judge MacDonald’s comments have created an appearance of bias such  
23 that recusal in this matter is required.  
24  
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26 <sup>61</sup> *Phillips v. State*, 271 P.3d 457, 466-67 (Alaska Ct. App. 2012).

27 <sup>62</sup> *Id.* See also AS 22.20.020(a)(9).

28 <sup>63</sup> AS 22.20.020(c).

<sup>64</sup> *Id.* See also *Phillips*, 271 P.3d at 463.

**A. Judge MacDonald has shown actual bias against the Public Defender Agency and its Lawyers Requiring Recusal**

The majority of Judge MacDonald's comments in the July 18 hearing concern the Public Defender Agency and its lawyers. Judge MacDonald's comments were aimed at Ms. Harber, the Agency, and public defenders generally. In considering these comments, it is helpful to briefly revisit the timeline and record in this case.

In March 2019, both Mr. Walters and the state agreed to continue this matter for purposes of negotiation given that the state had just made an offer to Mr. Walters the day before the hearing, nearly three months after Ms. Harber's initial attempt to begin this process.<sup>65</sup> At that hearing, Mr. Wallace noted the many homicide cases he was assigned to and alerted the court that he believed the end of summer would be earliest this trial could happen.<sup>66</sup> At the May 2019 omnibus hearing, Mr. Wallace indicated that Mr. Walters' case would be reassigned in his office, indicated that Ms. Harber would have to restart negotiations with a new lawyer (though the log notes do not indicate he informed her of who that would be), and noted that he did not have information about soon-to-be new counsel's availability for trial nor the availability of the witnesses. Given the results and comments made at both hearings, it appears or is at least likely that the July 22 trial date was considered somewhat tentative by

<sup>65</sup> Mr. Walters' counsel does not fault Mr. Wallace for this delay; rather, it is offered to show the disparate treatment between the parties and that the delay in this Murder 1 case that is less than two years old is not attributable only to Ms. Harber.

<sup>66</sup> For purposes of this motion, Mr. Walters' counsel has interpreted the comments reflected in the March 14, 2019 log notes to favor Judge MacDonald but also notes the ambiguity of this statement discussed above in footnote 6.

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2 both parties given the acknowledgement of the possibility of the renewal of  
3 negotiations and eminent departure of the assigned prosecutor.

4  
5 At the June 26 hearing, Ms. Harber requested a continuance citing a  
6 continued desire to negotiate, detailing a motion she would be required to file should  
7 negotiations not be possible, noting concern about her immense caseload, and  
8 alerted the court to scheduling concerns around the July 22 date. The state opposed  
9 and requested trial remain as set. The court denied Ms. Harber's request and  
10 scheduled the calendar call for July 16. Ms. Harber then resigned from her position  
11 with Agency due to mental exhaustion on July 15.

12  
13 **i. Judge MacDonald's Comments Regarding the Public**  
14 **Defender Agency and Public Defenders Generally**

15 During the hearings that took place on July 16 and July 18, Judge MacDonald  
16 made broad, sweeping statements maligning both the Alaska Public Defender  
17 Agency and public defenders generally. These comments will be addressed by  
18 theme to the extent possible.

19  
20 Judge MacDonald's broad, sweeping statements impugning the integrity and  
21 ability of the Agency and its lawyers show actual bias that Judge MacDonald holds  
22 against public defenders. Judge MacDonald claimed that the Agency "completely  
23 abandon[ed its] obligation [to protect Alaskan's fundamental rights],"<sup>67</sup> alleged that  
24 the lawyers at the Agency have a deficit of "professional courage" and that the  
25 Agency has "[mis]manage[d its] professional resources,"<sup>68</sup> advised that the Agency  
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28 <sup>67</sup> Ex. G, 17:7-13.

<sup>68</sup> Ex. G, 14-21 – 15:10.

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2 must hire “more conscientious attorneys,”<sup>69</sup> and asserted that when a public  
3 defender voices concern about providing ineffective assistance of counsel, this is in  
4 fact a stunt and the “last refuge of public defenders who don’t want to try their cases  
5 and fulfill their professional responsibilities.”<sup>70</sup> These comments show clear bias  
6 against the Agency and its lawyers and show that Judge MacDonald does not take  
7 concerns raised by public defenders seriously. It is difficult to imagine a Public  
8 Defender, and more importantly, a defendant to which the Agency is appointed, not  
9 feeling a distinct disadvantage and sense of unfairness when appearing in front of  
10 Judge MacDonald after these comments.  
11

12  
13 Further, Judge MacDonald has demonstrated a significant misunderstanding  
14 concerning the role of court-appointed counsel with respect to a defense attorney’s  
15 ethical obligations. Judge MacDonald criticized the Agency’s use of resources and  
16 repeatedly suggested that there is “a choice within necessity,” suggesting it is the  
17 Agency’s lawyers that decide whether or not a case goes to trial.<sup>71</sup> He further  
18 complained that it is the Public Defender Agency who “tie[s] up the District Court  
19 tending to B misdemeanors, demanding trial in the Bethel region, in Hooper Bay over  
20 B misdemeanors, A misdemeanors; tying up precious resources over lesser  
21 cases.”<sup>72</sup> To be clear, public defenders do not decide what cases are charged, nor  
22 do they decide what cases go to trial—these decisions are exclusively made by the  
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26 <sup>69</sup> Ex. G, 18:18-19.

27 <sup>70</sup> Ex. G, 19:22-24.

28 <sup>71</sup> Ex. G, 14:10-11, 14:20, 15:14.

<sup>72</sup> Ex. G, 14:15-19.



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2 state and the defendant respectively. This unfounded criticism represents a  
3 fundamental misunderstanding of the role of a defense attorney and of her ethical  
4 obligations to zealously advocate for her client. And yet as was made clear on July  
5 18, Judge MacDonald not only believes these inaccuracies but holds these  
6 misunderstanding against the Public Defender Agency and its lawyers.  
7

8 Lastly, Judge MacDonald has improperly attempted to involve himself in Ms.  
9 Metzger's management of her professional responsibilities. He inappropriately  
10 instructed Ms. Metzger that Mr. Walters' case should "move to the top of [her]  
11 responsibilities"<sup>73</sup> and noted that "if Ms. Metzger is scurrying around in district court  
12 or handling C felony theft cases...that would be a further demonstration of the Public  
13 Defender's misfeasance."<sup>74</sup> Given that the great majority of Ms. Metzger's cases are  
14 B and C level felony cases, the chances of this occurring are high. In other words,  
15 Judge MacDonald has prematurely ruled that if Ms. Metzger intends to uphold her  
16 professional obligations to all her clients, not just the one she represents here, Judge  
17 MacDonald will hold this against her, and by logical extension, her client, perhaps by  
18 forcing them to trial prematurely as he has just attempted to and shown willingness  
19 to do here. Finally, even though the July 18 hearing was only the second time Ms.  
20 Metzger has ever appeared in front of Judge MacDonald,<sup>75</sup> he nonetheless forecasts  
21 that "some time in 2020, Ms. Metzger, on the current pattern, is 50/50 going to be  
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26 <sup>73</sup> Ex. G, 22:21-22.

27 <sup>74</sup> Ex. G, 22:25 – 23:4.

28 <sup>75</sup> The first time Ms. Metzger appeared in front of Judge MacDonald was two days prior on July 16.

standing here with her hat in hand passing this onto someone else or perhaps, even like Ms. Harber, just disappear.”<sup>76</sup> These comments show a clear bias against Ms. Metzger, and by extension, Mr. Walters. These comments taken together show actual bias and require disqualification.

## ii. Judge MacDonald’s Comments Regarding Amanda Harber

While undersigned counsel adamantly disagrees with Judge MacDonald’s opinions concerning Ms. Harber expressed in both the July 16 and July 18 hearings, those comments are not what forms the basis for this motion. They are, however, illustrative of how this court views public defenders, especially as compared to their state counterparts. Even after learning of the circumstances surrounding Ms. Harber’s resignation, namely that she is suffering mental exhaustion and that she consulted with bar counsel before making the decision to resign,<sup>77</sup> Judge MacDonald deemed Ms. Harber’s resignation a “professional abandonment”<sup>78</sup> and “professionally irresponsibl[e],”<sup>79</sup> charged her and the Agency with “infidelity to clients,”<sup>80</sup> repeatedly asked Ms. Harber’s lawyer and former boss whether Ms. Harber was fit to practice law,<sup>81</sup> inquired as to whether either of them planned to report Ms. Harber to the bar association,<sup>82</sup> decided for itself that Ms. Harber was not

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<sup>76</sup> Ex. G, 18:14-17.

<sup>77</sup> Ex. G, 13:9-15.

<sup>78</sup> Ex. E, 3.

<sup>79</sup> Ex. G, 15:22-23.

<sup>80</sup> Ex. G, 16:7.

<sup>81</sup> Ex. G, 8:14-15, 13:20-21.

<sup>82</sup> Ex. G, 8:17-19.

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2 fit to practice and noted he would contemplate reporting her to the bar association,<sup>83</sup>  
3 called Ms. Harber “ethically unfit”<sup>84</sup> and said she “lack[ed] the professional—the  
4 responsibility’s fortitude,”<sup>85</sup> and admonished her a total of three times.<sup>86</sup>  
5

6 While Ms. Harber perhaps could have done more with respect to professional  
7 courtesies she might have extended to the state once her decision regarding her  
8 resignation was final, Judge MacDonald’s response to that inaction demonstrated a  
9 deep and confounding animus. This, when considered in conjunction with the  
10 comments made about the Agency and Public Defenders generally, reveals a clear  
11 and actual bias requiring Judge MacDonald’s disqualification in this case.  
12

13 **B. Judge MacDonald has shown actual bias against Mr. Walters**  
14 **requiring recusal**

15 Over the course of the hearing on July 18, Judge MacDonald predominantly  
16 aimed his ire at the Public Defender Agency and its current and former lawyers. But  
17 Judge MacDonald also made statements about Mr. Walters. Specifically Judge  
18 MacDonald stated:  
19

20 [I]f the people of Alaska are to be expected to be operating  
21 on the fringe of deprivation of fundamental rights, and if  
22 the people of Alaska are expected to tolerate the crime  
23 that brings us here today: the crime against women, the  
24 crimes fueled by substance abuse, the crimes against law  
25 enforcement officers, the crimes against rural Alaska, *the*  
26 *crimes continually perpetuated by defendants with*

26 <sup>83</sup> Ex. G, at 19:14-16, 20:4-5.

27 <sup>84</sup> Ex. G, at 19:17.

28 <sup>85</sup> Ex. G, at 19:17-18.

<sup>86</sup> Ex. G, 15:22, 17:22, 20:4.

1  
2 *repeated felonies, as Mr. Walters has, they should be so*  
3 *advised.*<sup>87</sup>

4 This statement amounts to a denial of Mr. Walter's most basic constitutional  
5 protection: the presumption of innocence. In this passage, Judge MacDonald  
6 discussed Mr. Walters' pending charges by listing the societal concerns implicated  
7 in the facts of this case. However, at the end of the passage, Judge MacDonald  
8 referred to the charges in this case as "crimes continually perpetuated by  
9 defendants with repeated felonies," and then referenced Mr. Walters by name.

10  
11 To be clear, the categories of crimes Judge MacDonald referenced were  
12 meant to describe the crimes charged in this case. Judge MacDonald then  
13 referenced them as crimes perpetuated by someone with prior criminal convictions  
14 and then *specifically* named Mr. Walters. This comment plainly shows that Judge  
15 MacDonald believes Mr. Walters has committed these crimes despite the fact that  
16 a trial has not yet occurred. A rejection of the presumption of innocence is bias *per*  
17 *se* and a blatant violation of Mr. Walters' right to due process. This comment alone  
18 requires recusal in this case.

19  
20  
21 **C. At a minimum, Judge MacDonald's comments when**  
22 **considered as a whole have created a reasonable appearance**  
23 **of bias such that recusal is required**

24 At the very least, the Court's statements have created an appearance of bias  
25 requiring disqualification. In *Matter of Brown*,<sup>88</sup> the Supreme Judicial Court of  
26 Massachusetts concluded that an appellate judge's conduct violated two judicial

27  
28 <sup>87</sup> Ex. G, 16:24 – 17:6 (emphasis added).

<sup>88</sup> 691 N.E.2d 573 (Mass. 1998) (cited by *Hanson v. Hanson*, 36 P.3d 1181 (Alaska 2001)).

1  
2 canons<sup>89</sup> based upon remarks the judge made during oral argument.<sup>90</sup> In that case,  
3 which concerned a union, the judge accused the union's president of unfairly  
4 enriching himself and his family members at the expense of the union's members.<sup>91</sup>  
5 Specifically, the judge stated that the union president "had his whole family on the  
6 [union's] payroll," that "[t]his is a [] union gone amok," that "people in the courthouse  
7 here who pay their dues get absolutely nothing," that "[the union president] and all  
8 his family are making \$200,000 a year, plus they have cars and expense accounts,"  
9 and that "[the union doesn't] represent anybody as far as [Justice Brown] can see.  
10 They just take money and keep on stepping and buy more condos and have more  
11 expense accounts and have fancy banquets."<sup>92</sup>  
12

13  
14 The court found these remarks to violate both Canons 2(A) and 3(A)(3)  
15 characterizing them as "express[ing] what appears to be a strong animus against the  
16 union and its leadership, accusing them of a *general and persistent neglect of their*  
17 *obligations* to the membership."<sup>93</sup> Further, although the Supreme Court did not find  
18 that the judge was unfair or partial in actually deciding the case, the court concluded  
19 a judge's power over his fellow citizens dictates that a judge must also appear to be  
20  
21

22  
23 <sup>89</sup> The trial judge violated Canon 2(A) requiring a judge to conduct himself in a manner that  
24 promotes public confidence in the integrity and impartiality of the judiciary and Canon 3(A)(3)  
25 requiring a judge to be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers,  
and others with whom he deals in his official capacity. *Id.* Alaska's Code of Judicial Conduct  
includes both of these requirements. See Alaska Code of Judicial Conduct Canons 2(A) and  
3(B)(4).

26 <sup>90</sup> *Matter of Brown*, 691 N.E.2d at 575-79.

27 <sup>91</sup> *Id.*

28 <sup>92</sup> *Id.* at 574-75.

<sup>93</sup> *Id.* at 576.

1  
2 fair.<sup>94</sup> Noting that judges are in a privileged position to command respect and silence  
3 from the ordinary citizen before them, the court observed that this power must not  
4 be wielded gratuitously: “When a judge berates or acts discourteously to those  
5 before him – even if he cannot affect their interests as litigants – he abuses his power  
6 and humiliates those who are forbidden to speak back.”<sup>95</sup> The result in this case was  
7 that Justice Brown was publicly reprimanded and was recused from future cases  
8 involving the union, the union’s president, or any member of the union president’s  
9 family.<sup>96</sup>

10  
11  
12 The facts of *Brown* are remarkably similar to this case. Like Justice Brown,  
13 Judge MacDonald has made broad, sweeping, and in this case, unfounded  
14 comments about the integrity and ability of the Public Defender Agency and its  
15 lawyers. Accusations of neglect and expressions of animus appear in both cases.  
16 Where the remarks in *Brown* were about a non-party to the case (the union  
17 president), Judge MacDonald’s comments concern the Agency and lawyers  
18 appointed to represent Mr. Walters and Mr. Walters himself. The remarks in both  
19 cases are easily described as “the very opposite of the ‘patient, dignified, and  
20 courteous’ conduct required of a judge.”<sup>97</sup> And like in *Brown*, the result here should  
21 be that Judge MacDonald is disqualified from presiding over this case or any case  
22 to which the Public Defender Agency is assigned.  
23  
24

25  
26 <sup>94</sup> *Id.*

27 <sup>95</sup> *Id.*

28 <sup>96</sup> *Id.* at 579.

<sup>97</sup> *Id.* at 576.

V. CONCLUSION

For all the reasons stated above, Judge MacDonald should recuse himself from this case and another Superior Court judge should be assigned.

ALASKA PUBLIC DEFENDER AGENCY

DATE

8/13/19

Julia C. Metzger

Assistant Public Defender

Alaska Bar No. 1211120

I certify that on 8/13/19 a copy of this document and its attachments was faxed/mailed/hand-delivered to: DAO

By:

SCM